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JDF-2

Before the  
SURFACE TRANSPORTATION BOARD

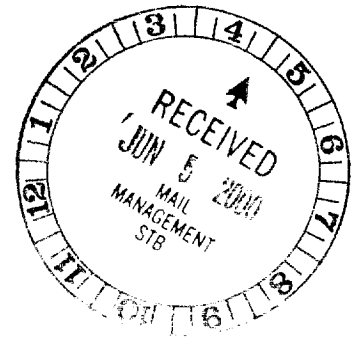
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Ex Parte No. 582 (Sub-No. 1)  
MAJOR RAIL CONSOLIDATION PROCEDURES

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REPLY COMMENTS

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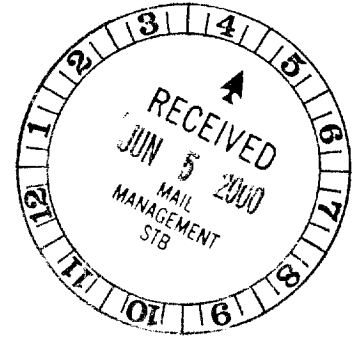
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Attorney for John D. Fitzgerald

Due Date: June 5, 2000

Before the  
SURFACE TRANSPORTATION BOARD

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John D. Fitzgerald,<sup>1/</sup> for and on behalf of United Transportation Union-General Committee of Adjustment (GO-386), submits these reply comments, in response to the comments by others, in this Advance Notice of Proposed Rulemaking (ANPR) proceeding. 65 Fed. Reg. 18021-26 (Apr. 6, 2000).

There were an estimated 118 initial comments filed with respect to the ANPR.<sup>2/</sup> Clearly, this commentor cannot reply to every submission, but will attempt to deal with matters related to his own initial comments, filed May 16, 2000. (JDF-1). Failure to reply to any initial comments advanced by others does not necessarily imply or indicate agreement with such comments.

New Pronouncement

Subsequent to issuance of the ANPR on March 31, 2000, the Surface Transportation Board (STB or Board) on May 19, 2000, filed

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<sup>1/</sup> General Chairman for United Transportation Union on lines of The Burlington Northern and Santa Fe Railway Company, with offices at 400 East Evergreen Boulevard, Vancouver, WA 98660.

<sup>2/</sup> See: Gallagher, John: The Merger Question, Traffic World 35-36 (May 29, 2000).

its brief with the U.S. Court of Appeals in No. 00-1115, et al., Western Coal Traffic League, Et Al. v. Surface Transportation Board. This commentor is not involved in the judicial proceedings. However, the Board's characterization of its March 31, 2000 decision setting forth the scope of the ANPR is significant, for it appears to constitute a departure from the scope set forth in the ANPR.

### I. HISTORICAL DEVELOPMENT.

Many of the initial comments echo the Board's statement in the ANPR to the effect that the agency's current consolidation provisions stem from the Staggers Act, and that the Board intends significant changes in its rules and regulations, asserting excess capacity guided the prior regulations.

1. Staggers Act of 1980. The many initial comments tracing the current agency provisions to Staggers Act of 1980 are incorrect, and simply repeat the Board's error. (JDF-1, 4-5). There was no significant change in substantive consolidation rules for class I rail unification between the 4-R and Staggers legislation.<sup>3/</sup>

2. Policy Statement or Rules/Regulations. The ANPR invited comments on modification of STB regulations, (ANPR, 1). The term rule or rules appears 7 times on page 2, and once on page

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<sup>3/</sup> Indeed, in general, the Staggers Act carried forward the initiatives already enacted by the 4-R Act. The major Staggers change was statutory provision for contract rail rates, which the ICC had encouraged, but which the rail carriers were reluctant to utilize absent legislation. It is suggested that rail deregulation thus preceded air passenger deregulation, and took place during the Congressional controversies concerning AT&T and other communications matters.

3. (ANPR, 2-3). On page 4, the term rules appears twice, and regulations is found at four places. (ANPR, 4). The terms rule, rules, or regulations, are employed 8 times on page 5, twice on page 6, once on page 7, 5 times on page 8, once on pages 9, and 10, and 3 times on page 11. (ANPR, 5-11). On the other hand, the term policy appears only once on page 4 and once on page 7, and both instances are in connection with "enhancing" or "promoting and enhancing" competition. (ANPR, 4, 7).

The STB's May 19, 2000 brief to the U.S. Court states the purpose of the instant proceeding is instead with respect to "policies and procedures," throughout its submission.

It is critical that the STB in its forthcoming Notice of Proposed Rules (NPR) make perfectly clear whether it is proposing a policy change, rather than a rule change, or whether both are involved and to the what extent.

A policy pronouncement is of little or no precedent value, is not binding, and is subject to very limited judicial review. A policy statement generally is reviewed when it is applied. A rule or regulation, on the other hand, is entirely different--it is binding and subject to more stringent judicial review. See: Assure Comp. Transp. v. United States, 635 F.2d 1301 (7th Cir. 1980); Farmland Industries, Inc. v. United States, 642 F.2d 208 (7th Cir.1981); American Bus Ass'n v. United States, 627 F.2d 525 (D.C. Cir. 1980); Molycorp, Inc. v. U.S.E.P.A., 197 F.3d 543 (D.C. Cir. 1999); ANR Pipeline Co. v. F.E.R.C., 210 F.3d 403 (D.C. Cir. 2000).

3. Asserted Excess Capacity. A number of comments agree with the ANPR's view that the current merger regulations were

aimed at accomplishing a reduction in railroad capacity, citing 49 CFR § 1180.1(a). (ANPR, 3 & n.9). However, although the 1978 policy statement of the former ICC was truly aimed at capacity reduction, the current policy on this score, adopted in 1981, it eliminated any affirmative role of the regulatory agency in capacity reduction. Cf. Railroad Consolidation Procedures, 359 I.C.C. 195, 198 (1978); Railroad Consolidation Procedures, 363 I.C.C. 784, 791 (1981).

It is difficult to read the current regulations as aimed at capacity reduction, and recent STB decisions involving consolidation of class I rail carriers were are not predicated upon capacity reduction. Moreover, it is unclear what is meant by capacity. Is it car supply, locomotive equipment, miles of trackage, etc.? There has been a deficit, not an excess, of railroad capacity in the past two decades, however measured.

.II. PROCEDURAL MATTERS. This commentor made reference to certain procedures which are unsatisfactory, but would await comments by others. (JDF-1, 8).

1. Hearings. This commentor is unable to locate reference to public hearings in the initial comments by other parties. The STB did not conduct public hearings in recent consolidation proceedings. The STB does not have a single Administrative Law Judge (ALJ). Even when the agency last had an ALJ, who conducted extensive hearings, the ALJ frequently did not render an Initial Decision. The record was merely certified to the agency, i.e., the staff. The only hearings in UP/SP and in CSX/NS-Conrail were conducted by an ALJ from another agency, and were restricted to

discovery issues. Moreover, most of these "hearings" were closed to the public, and were held in Washington, D.C.

The lack of public hearings, particularly in the field as in former consolidation proceedings, tends to undermine public confidence in the agency. The public is deprived of input. When there were public hearing in consolidation cases, potential problems were discovered and analyzed. Railroad employees frequently appeared at local hearings, and contributed to the evidentiary process--particularly regarding operating matters.

2. Secret Procedures. Current practice at the STB allows much, if not most, of the critical evidence to be placed under seal. This was very rare in railroad consolidation proceedings until recent years. The secret critical materials, and thus the important part of the proceedings, have a limited audience, and the scope of analysis by the public, and by all parties, is highly circumscribed. Secrecy comes at a high price to the knowledge process--government agencies should keep secrecy at the absolute minimum particularly where, as here, defense matters rarely are involved. See: Moynihan, Sen. Daniel P., Secrecy (Yale Univ. Press, 1998).


The comments of Kansas City Southern Railway Company (KCS), insofar as they seek greater disclosure, should be encouraged. (KCS, 21-32, 44-54, 54-64, 82-91). The comments of Norfolk Southern Railway Company (NS), seeking an automatic protective order, should be discouraged. (NS, 68-69).

This commentor opposes the request by BNSF for complete discretion to select the classes or crafts to be used in providing employee impact and the format to be used in presenting employee

impact data. (BNSF, 43-44). This commentor has objected to the carriers' unilateral designation of these important matters, which have ramifications both inside and outside the decisional process.

3. Diskette Requirements. There is no longer any basis for requiring employees and their organizations be subject to a mandatory diskette requirement for their submissions. The STB's website recently has discontinued posting filings in the WP format, and instead uses the PDF.

Respectfully submitted,

  
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June 5, 2000

Attorney for John D. Fitzgerald

Certificate of Service

I hereby certify I have served a copy of the foregoing upon all parties of record shown in the STB's service list served April 28, 2000, as amended, by first class mail postage-prepaid.

Washington DC

  
Gordon P. MacDougall